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Vol. II
TRANSCRIPT OF RECORD

(Pages 609 to 1216)

Supreme Court of the United States

OCTOBER TERM, 1951

No. 178

UEBERSEE FINANZ-KORPORATION, A. G.,
PETITIONER.

vs.

J. HOWARD MCGRATH, ATTORNEY GENERAL, AND
AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED JULY 7, 1951.

CERTIORARI GRANTED OCTOBER 15, 1951.

JOINT APPENDIX

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10,464

UEBERSEE FINANZ-KORPORATION, A. G.,

Appellant,

—against—

J. HOWARD McGRATH, Attorney General and as
successor to the Alien Property Custodian,

Appellee.

Appeal from the District Court of the United States for the
District of Columbia.

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Mr. Gallagher: What was that answer, Mr. Reporter?

(The ~~last~~ answer was read by the reporter.)

Mr. Burling: I may have the wrong exhibit.

By Mr. Burling:

Q. Now, will you look at Plaintiff's Exhibit 10. Does this not state—

"Your son informed me that Dr. Faust is concerned about the problem whether or not an income tax may be payable under the provisions of Section 30."

A. On which page is that, please?

910 Q. The first page. A. Yes, I see that.

Q. Does that refresh your recollection that you did have a talk with Hachenburg about tax problems? A. That I referred to him the thoughts of Dr. Faust, yes.

Q. And you didn't talk to Wronker-Flatow about that subject? A. I don't think so, that I talked it over with Dr. Wronker-Flatow. There wasn't so much time left to go into this intricate detail of taxes.

Q. That is my point—there were intricate details of taxes that were just left undiscussed! Isn't that true? A. No, Mr. Burling; you misunderstood me. Taxes had to be paid. So it was of no importance who paid it. Either my father had to pay it or I had to pay it.

Q. Your father was a very rich man, even after this gift, wasn't he? A. Yes.

Q. Aside from this gift, you were insolvent? Didn't you testify to that fact? A. I had no money of my own, yes, that is what I testified.

Q. Wouldn't the question of whether your father had to pay the taxes, or you had to pay the taxes—

911 Mr. Ingoldsby: Just one second, please.

Your Honor, if I may make a suggestion, or an objection by way of suggestion, for the purpose of clarity, we are talking about three different types of taxes here.

Mr. Burling: You are talking about ten different kinds.

Mr. Ingoldsby: At least three—the capital gains tax, the tax on the gift, and the tax on income attaching to the gift.

In order to avoid confusion with the witness, may I suggest that the particular type of tax spoken of be identified?

The Court: I will have to leave that to Mr. Burling.

Mr. Burling: If Your Honor please, my point is that there was a wide variety of tax problems, all of which were ignored.

The Court: I think the question is permissible.

By Mr. Burling:

Q. Did you discuss with Wronker-Flatow any question about American income tax law? A. I don't think so.

Q. In the event you had predeceased both parents, the gift would have reverted to your father and mother. Isn't that correct? A. What is what is stated in the gift contract.

Q. And did you have any discussions with 912 Wronker-Flatow about the effect of that possibility on the estate tax, which either your father or your mother might have to pay? A. I don't think so, because it is obvious under German tax laws that if such a contingency happens, you have the old, prepaid gift tax refunded in some way. You haven't to pay double taxation.

Q. And what was said about the gift tax, between you and Wronker-Flatow? A. I don't think Dr. Wronker-Flatow had anything to do with these tax problems.

Q. I see. A. He wasn't my father's tax adviser.

Q. Your father did have a tax adviser, didn't he? A. He always talked over his tax problems with one of the employees at General Motors.

Q. Who was that? A. I think it was Dr. Faust.

Q. And Dr. Faust was not called in on October 5, was he? A. These tax problems, as I told you—

Q. Was he? A. No, he wasn't called in.

Q. Thank you. Now did Dr. Wronker-Flatow dictate a preliminary draft of your version of the gift agreement, 913 or did he dictate the final draft directly to a stenographer? A. I wasn't present. He did that in his own office.

Q. You never saw a preliminary draft, or went over it with him? A. I don't remember, Mr. Burling. I only saw the final copy of which we now regard as the original.

Q. What is your best estimate as to the amount of time which elapsed between the time your father told Wronker-Flatow to revise the Hachenburg draft and the time your father signed the Wronker-Flatow draft? A. That would be a very wild guess, after seventeen years.

Q. Well, give us your best estimate, please. A. At least several hours.

Q. At least several hours? A. I think so. But I think the actual redrafting, as I told you this forenoon, wouldn't take more than half an hour or an hour. It wasn't a very difficult job.

Q. Wronker-Flatow had never previously been your father's personal counsel, had he? A. And not even on this occasion, no.

Q. Had he? A. No.

Q. And not even on this occasion either. A. He acted as an international lawyer present in the building, 914 and my father, who knew him well, asked him to do him a favor and drafted this agreement. You cannot call him his counsel, because he wasn't paid for it, as far as I know.

Q. By the way, under the terms of your father's will, you either could become the executor or you could name the executor? Isn't that right? A. Under the terms I was to become the executor, yes. And I had the right, if

I so desired and if I would be absent, to appoint an executor, yes.

Q. Are you familiar with the estate which your father left? A. No; I have no time to go into this matter yet.

Q. Can you tell us whether among the assets of the estate is a debt owing from Wronker-Flatow in the sum of \$20,000? A. That is possible.

Q. Well, can you say whether Wronker-Flatow does or does not owe the estate \$20,000? A. I think so. But I would not testify out of my own knowledge, because I have not yet seen a list of the assets of the estate.

Q. I see. A. And the estate would not get this \$20,000, because all those amounts go to the military government.

915 Q. Is it not true that it was your intention while you were coming to America on the Europa to put the Opel shares to General Motors? A. No, you can't say that.

Q. The answer, then, is no? A. It was my intention to discuss—

Q. The answer, Mr. von Opel, is no!

If you would just answer my question, we would get along much faster. A. All right, yes.

Q. On October 2nd, in the course of your discussion with Hachenburg, you had talked over the creation of a holding company into which to put the proceeds of the gift, hadn't you? A. That was a suggestion of Dr. Hachenburg, as expressed in his letter of October 3, yes.

Q. And at that time, while you were having a discussion with Hachenburg, didn't you contemplate selling the Opel shares and buying new investments and putting the new investments in Uebersee? A. At the time I had my discussion with Hachenburg, I had only one interest in the matter, and that was that title should pass to me, and that the thing would be done as quickly as possible.

Q. But you haven't answered my question, once 916 again.

Didn't you intend, on October 2nd, didn't you expect to sell the Opel shares and buy new investments and

put them in Uebersee? A. On October 2nd, I don't think so.

Q. What were you going to do with the holding company? A. Dr. Hachenburg suggested it, as you see out of the letter.

Q. You didn't think you were going to put the Opel shares into the holding company, did you? A. Dr. Hachenburg is talking about proceeds.

Q. Yes. You did not think you were going to put the Opel shares in the holding company, did you? A. If I would keep the Opel shares, there would be no chance of putting them in the holding company.

Q. So the answer to that question is yes, isn't it?

Mr. Gallagher: What is the question?

By Mr. Burling:

Q. You did not intend to put the Opel shares in the holding company, did you? A. I don't think so.

Q. Thank you. At any rate, the possibility that you might sell the shares to General Motors was discussed by you and your father, was it not? A. Certainly; I pointed out to my father that I was very much afraid about this lack of any gold clause in the contract, 917 and that the first thing I would do would be an attempt to get that changed.

Q. The first thing you would ask for would be a gold clause? Is that right? A. That is what I intended first, to put the escrow agreement on a safe basis.

Q. Now, you have testified, also, that one of the considerations that motivated you coming to Wiesbaden and asking your father to make the gift was that the foreign exchange regulations were becoming more stringent.

Now, will you explain what good a gold clause would have done you in the event that General Motors had subsequently exercised its option and bought the shares? A. You just spoke about the date of October 5. They were

at this date my shares and I was very much concerned about it, and I had nothing to do with German foreign currency regulations. So I could not understand this question.

Mr. Burling (to the clerk): May I have Plaintiff's Exhibit 5, please—and 5-A?

By Mr. Burling:

Q. Will you examine Plaintiff's Exhibit 5 once again—

Mr. Burling: And may I hand it once more to your Honor (handing)?

By Mr. Burling:

Q. This recites, does it not, in the beginning paragraph?

918 "It is our common desire that these stocks remain with the male line of our family in order to preserve a personal connection between the bearers of the name of Opel and the work of our father Adam Opel."

That clause was put in by Dr. Wronker-Flatow? Is that right? A. I think upon my suggestion it was?

Q. Your suggestion? A. If I remember correctly.

Q. And at that time you did not expect the shares to remain with the male line of the Opel family, did you?

A. It was put in for a certain purpose.

Q. Will you state what the purpose was? A. Within three months this gift had to be reported to the government. And at this time the government would know that I was, or they knew before, that I was a devisen auslander and that a gift was made entirely legal from a devisen inlander to a devisen auslander.

Q. Please go ahead and explain the purpose. A. The purpose was to explain to the authorities that no immediate sale was contemplated.

Q. In other words, the purpose was to deceive the authorities, wasn't it? A. It isn't a deception, no.

919 Q. How do you characterize it? A. In any event, Mr. Burling, within three or four years—

Q. How do you characterize it? A. In within three or four years those shares had to be sold anyhow.

Q. I know that. A. So this whole phrasing of this sentence—

Q. Is deliberately deceptive, isn't it? A. If you call it such.

Q. Now, will you explain once more why it is that after your father gave you the shares on October 5, he then on October 6 gave you a power of attorney; and why in New York you acted under the power of attorney as your father's attorney in fact, instead as of owner of the shares? A. This was done on the advice of Dr. Wronker-Flatow, who had a large experience in dealing with American enterprises and banks.

He told my father and me at the time that it would be awfully difficult for me to go over to America and deal under the escrow agreement, based upon this gift agreement, because it was a German instrument.

Q. Well, Wronker-Flatow was in fact General Motors' German attorney, wasn't he? A. He was, I think.

920 yes.

Q. Did he say that he would telephone or cable to General Motors and tell them that the instrument was all right, because he himself had drafted it? A. Why should he?

Q. If he thought there might be difficulty with General Motors as to the validity of an agreement, would he not say, "I am General Motors' German attorney and I will call them up and tell them I drafted the agreement and it is valid." A. We asked him to do just the opposite, to keep it secret. We didn't want to have it shouted over the rooftops.

Q. Did you want to have General Motors know about the gift? A. I don't think so. There was no necessity.

Q. And in fact you didn't advise General Motors about the gift, did you? A. No, I didn't. I thought I had advised them, but I found out it was a mistake; I did not advise them.

Q. Will you explain how it is that your father could give you power of attorney on October 6, 1931, to deal with property when he had no title whatever to that property on that day? A. If you ask me for a legal opinion, I heard an expert on law testify to that that is usual procedure in Germany, nothing uncommon.

Q. I see; all right.

921 Now, is it true that on Monday, October 5, you and your father were still undecided as to whether he should go to New York or whether you should go to New York? A. Oh, no, Mr. Burling; that is quite different.

Q. It was never thought your father might go to New York? A. No; but I asked him—

Q. Just a moment. Please answer my question and not volunteer. A. No. He did not want to go to America.

Q. I see. Now, Plaintiff's Exhibit 52 reads:

"John Thomas Smith, New York.

"Are you available for interview in personal matter in New York on October 13? If so myself or my son intends sailing Wednesday for New York. Stop. Cable reply will oblige. Kind regards."

Signed Wilhelm von Opel.

Now, did your father send that cable to Mr. Smith on October 5? A. Yes; it was upon my suggestion.

Q. And on that day your father had no intention of going to New York? Is that right? A. I told him—no, he did not want to go, no.

Q. Will you explain, now, why you caused your father to tell Smith he was thinking of coming to New York, when in fact he wasn't? A. Because Mr. Smith intended to come to Europe and, as we had

been advised, he intended to sail in the middle of October, and I could not be in New York before the 13th.

So I thought if I announced my visit, he might not have time for me. But if my father announced this visit, he will make it possible to hear him, you see.

Q. And it was your purpose to deceive Mr. Smith? Is that right? A. If you call this a deception, the entire business life is full of deceptions—in order to make sure that he was present in New York awaiting us there and he should not depart before I was there.

Q. Now, going back to the usufruct provisions of the gift agreement, you were opposed to them, were you not? A. That is a rather general question.

Q. Well, you protested against their insertion, didn't you? A. Yes.

Q. Now, skipping some transactions here, is it not true that ultimately the proceeds of the Opel shares found their way into Overseas Finance Corporation, or the plaintiff here? A. Yes, sir.

Q. And it is true, is it not, that with the exception of three qualifying shares, the shares were put into 923 Box 1917 at the Schweizerische Kreditanstalt in Zurich? A. Yes, sir.

Q. And is it true that the key to that box was handed by you to a man named Hans Frankenberg, isn't it? A. Yes, I think in 1934 it was, if I am not mistaken.

Q. 1934? A. Yes, I guess so. Q. Will you fix the date as close as you can, please? A. I think it was 1934, or a little bit ahead of this time. Let us say around 1934.

Q. What is your best estimate as to the month? A. I can't guess at it. It is so long ago. I think it was in 1934; and if I guess roughly, I think in the spring or summer of 1934—some such date.

Q. The spring or summer of 1934? A. I think so.

Q. And will you agree with me that that was box 1917? A. I don't remember this number. It is possible.

Q. And you don't dispute it? A. Please?

Q. You don't dispute my statement that it was Box 1917? A. No, certainly not.

Q. Will you tell the Court in detail just exactly what you did with the key to that box, and all this surrounding conversation you had with anyone to whom you gave the key to the box? A. In this year, you mean?

Q. You say you gave the key to Frankenberg? A. Yes.

Q. What did you say to Frankenberg and what did he say to you, when you gave him the key? A. I gave him the key and I think the box was in my name, in my personal name, and I gave him the key to open it jointly, I think, with Mr. Geng, who is the auditor of the corporation.

Q. How many keys were there to the box? A. I think, if I remember correctly, I had a key, too, and lost it shortly thereafter.

Mr. Burling: At this point I ask that counsel concede the genuineness of a record taken from the records of the plaintiff corporation, produced pursuant to Court order.

(The document was handed to counsel for the plaintiff.)

Mr. Burling: I ask that this be marked for identification.

The Deputy Clerk: Do you want this to be 45-A? This is the German.

Mr. Burling: Yes; I will give you 45, also.

(The documents referred to were marked Defendant's Exhibits 45 and 45-A for identification.)

925 Mr. Gallagher: The original of this is a copy out of our books?

Mr. Burling: I have handed counsel an English translation of a photostat of a document produced pursuant to Court order, as the books and records of plaintiff corporation.

By Mr. Burling:

Q. I hand you Defendant's Exhibit 45-A—

And may I hand Your Honor the English!—

Mr. Ingoldsby: We concede the genuineness of it, as requested.

By Mr. Burling:

Q. This is a letter addressed to Davis, Polk, Wardwell, Gardner & Reed, dated May 21, 1935, and it reads:

"The stock of our company is at the power of disposal of the Adler and Company Aktien Gesellschaft as security for this debt, in that Dr. Frankenberg of Aktien Gesellschaft, delegate to the board of directors, has in his possession the only key for the safe number 1917 with the Schweizerische Kreditanstalt in Zurich."

Does that refresh your recollection as to how many keys there were and who had possession of them, or it?

A. May I ask you, whose letter is that?

Q. May I ask you whose letter that is? This is a letter taken from the files of Uebersee Finanz-Korporation. A.

This is an unsigned letter.

926 Q. Well, I will call upon any representative of the plaintiff to state whose letter it is. A. I couldn't tell you. It might be a draft of a letter.

Q. Was it the custom in keeping the files of Uebersee Finanz-Korporation to prepare drafts and then put them in the files, without indicating that they were not sent? A. I saw the books of the corporation for the first time after they were sent here, and I found in many instances very many drafts of agreements and so on.

Mr. Burling: I offer the letter in evidence, and I submit, Your Honor, that the plaintiff is bound by its own books and records.

The Witness: This is an unsigned letter.

Mr. Burling: I submit, Your Honor, that an outgoing letter kept in the regular course of business by the plaintiff corporation must be assumed to have been sent, unless proof is adduced to the contrary.

The Court: If there is no objection to it, I will admit it.

Mr. Ingoldsby: No objection, Your Honor.

Mr. Gallagher: As a matter of fact, I might state for your information, Mr. Burling, I think, although I have not seen this, this is probably a letter in response to a wire sent from New York by Mr. von Opel, at the request 927 of Davis, Polk, Wardwell, Gardner & Reed, in which certain facts were set forth, and asking the Swiss whether those facts were correct—and I believe this is the answer to it. We haven't found the answer. We have no objection to the letter.

(The documents previously marked for identification Defendant's Exhibits 45 and 45-A were received in evidence.)

By Mr. Burling:

Q. In any event, does the reading of the letter refresh your recollection as to how many keys there were? A. I haven't seen this. May I have it back again?

Q. This document recites—

Mr. Ingoldsby: The witness is looking at the letter, Mr. Burling.

By Mr. Burling:

Q. Have you found the— A. Yes, I see the reference here, yes.

Q. Does it refresh your recollection as to how many keys to that box there were? A. Apparently at this time, no.

Q. And to the best of your knowledge and belief, Frankenberg had it? A. He was empowered, jointly with Geng.

Q. To the best of your knowledge and belief, 928 Frankenberg had the one key? A. I don't know who possessed it. They both could open the safe.

Q. Could you open the safe without having the key? A. Certainly not. But if two men are empowered, they both have to go together. And I think that was the agreement.

Q. At the time you delivered the key to Frankenberg, what did you say to him, and what did he say to you? A. It was in about April, 1935, after—

Q. What did you say to him and what did he say to you? A. I asked him whether—I described the troubles in Germany and asked him whether he would be willing, if my father so desired, to act as his representative.

Q. Did he say he was already your father's representative? A. No.

Q. What did he say? A. He said if my father wanted him to do that, he would be willing.

Q. And did he take the key? A. He had the key a year.

Q. When did you first give him the key? A. As I told you before, it must have been 1934.

929 Q. My question was what did you say to him and what did he say to you when you handed him the key? A. I told you before, Mr. Burling, I gave him the key, if I could remember it correctly, in 1934, or even prior to this time.

Q. Are you unable to understand my question? I said three times what did you say to Frankenberg and what did Frankenberg say to you when you first handed him the key? A. At this time an agreement was made and I think deposited in writing—with the bank, that Frankenberg jointly with Mr. Geng could open the safe. And at this time I myself had a second key.

Mr. Ingoldsby: May the record show at what time that was?

The Court: He said the first time. I think he said in 1934.

The Witness: 1934, or even sooner.

By Mr. Burling:

Q. Did you have any discussion with Frankenberg when you handed him the key?—yes or no? A. The discussion I just described.

Q. You didn't describe the discussion. A. Yes, that the bank was instructed—

Q. Who said what? What was the discussion? Let us see what you said to Mr. Frankenberg, and then 930 what he said to you? A. The bank was instructed—

Q. You said that? A. I was the owner of the safe, and I had instructed the bank.

Q. Won't you tell me what you said to Mr. Frankenberg, Mr. von Opel? What did you say to him? A. Frankenberg!

Q. Yes. A. That he had access to the safe, together with Mr. Geng. I think he insisted upon having Mr. Geng—

Q. And what did he say to you? A. Nothing.

Q. He didn't say a thing to you? You handed him the key, and he didn't say anything? A. There was nothing in the safe but those Overseas shares, and they had been taken out for stockholders' meetings.

Q. But you handed Frankenberg a key to a box in which securities valued at perhaps four million dollars— A. Oh, you are mistaken. Why four million dollars?

Q. All right. You handed him the key to the box in which the Uebersee shares are contained. Did he say nothing at all? A. Those shares had no great value, Mr. Burling.

931 Q. Fine. Did he say anything, Mr. von Opel? A. No, I just—

Q. He was just absolutely silent? A. He asked me, if I remember correctly, that he wanted Mr. Geng as a joint,

so to say, how would you express it, that they could both go and get the shares for stockholders' meetings.

Q. I see. And that is all you can remember— A. And that was at the time the purpose—

Q. I wish you would wait until I ask the question, and then try to answer it—

That is all you can remember about the conversation at the time you handed Frankenberg the key? A. Yes. And I think—

Q. Thank you. And at that time you yourself had a key? A. Yes, I think so.

Q. What happened to that key? A. I think I lost this key.

Q. And at a later date you had a conversation with Frankenberg about acting as your father's agent? Is that right? A. Much later.

Q. And what is your best estimate of the date of 932 that conversation? A. I think at least three-quarters of a year, if not more.

Q. When does that bring us to? A. That brings us to April, 1935.

Q. And at that time, as I understand it, you asked Frankenberg to continue holding the key as your father's agent? Is that right? A. Yes; I described to him the situation and asked him—

Q. Is that right? A. Yes.

Q. And did you tell him at that time you had lost your key and the key in his possession— A. I think—

Q. Wait a minute, please. Did you tell him at that time you had lost your key and he had, therefore, the only key outstanding? A. I don't remember this conversation.

Q. At that time was Frankenberg your father's agent? A. In the strict legal sense of the word, as I see it now, I think no.

Q. When for the first time did you tell your father that Frankenberg was holding the key? A. That was about five to six months later, when I had returned from America.

933 Q. Well, fix the date, please. A. This was in the summer or fall of 1935.

Q. Before that time, had you even spoken to your father about Frankenberg's being his agent? A. No.

Q. You had no conversation with your father whatever — A. No.

Q: —indicating that Frankenberg was his agent? A. No.

Q. Now, I will read you one sentence from the gold case affidavit, which was read to you by Mr. Gallagher:

"This key is held by Dr. Frankenberg as agent and representative of my father, Wilhelm von Opel, for the purpose of safeguarding his usufruct."

Was that statement, which comes from your affidavit, true or false? A. At this time I consider Dr. Frankenberg—you are speaking about April, 1935—I considered him at this time as the agent of my father, because I felt that my father had all interest or even would be forced by the Nazi Government to establish something—

Q. Will you answer the question? Is the sentence that I read to you true or false? A. I believe at the time that it was correct.

Q. You now know that it was false, do you? A. 934 I now learned more about the legal detail of a power of attorney, and representatives, and I am now told by my legal advisers that the usufruct only can be established if the usufructuary directly empowers the trustee.

Mr. Burling (to the deputy clerk): May I have this marked the next number, please?

(The document referred to was marked for identification as Defendant's Exhibits 46 and 46-A.)

By Mr. Burling:

Q. Will you explain how it was that on June 5, 1935, when you executed this affidavit, you thought that Frank-

enberg was your father's agent, if you had never spoken to your father about Frankenberg's being his agent?

Mr. Ingoldsby: May I interrupt? I object, Your Honor. The statement relates to whether or not Frankenberg was the agent of the father. The set of facts upon which the statement is based has been stated. I submit that anything from there on is a legal conclusion as to whether or not those facts constitute agency.

The Court: He can explain his statement, and his understanding of his own statement.

By Mr. Burling:

Q. Will you go ahead, please? A. Please!

Q. Will you answer the question, please?

935 (The pending question having been read by the reporter):

The Witness: I thought that my father would be forced to establish a usufruct by the Nazi Government; and I wanted to be helpful. And I was at this time thoroughly convinced that he ultimately would be forced to do so.

By Mr. Burling:

Q. So your statement is that you swore that Frankenberg was your father's agent because you thought or you were thoroughly convinced that in the future your father would make him his agent? Is that right? A. It is not quite correct.

Q. Well, will you state what is quite correct, then? A. I considered him as my father's representative, and I thought I had acted in the best interest of my father, who was at the time heavily threatened by the Nazi Government.

Mr. Burling: I ask at this time that plaintiffs concede the genuineness of Defendant's Exhibit 46-A, which is a photostat of a document from the files and records of the plaintiff.

Mr. Gallagher: No objection.

Mr. Burling: I offer it in evidence.

(The documents previously marked for identification Defendant's Exhibits 46 and 46-A were received in evidence.)

936 By Mr. Burling:

Q. Prior to this agency conversation with Frankenberg, in I think you said April, 1935, it was within your knowledge that Frankenberg was an old friend of your father's, wasn't it? A. "An old friend," I think, goes a little bit too far. My father knew him since very long time, and so did I. But he was not, as you can say, a friend of my father. He was an acquaintance.

Q. And I asked you yesterday, is it not the fact that in the gold case you stated that your father received a stipulation from you at the time of the gift, that you would put the proceeds in a holding company— A. That was my intention.

Q. —to safeguard your father's usufruct. A. That was my intention. At the time my father didn't want it.

Q. Well, at any rate, you had put the proceeds of the gift into a holding company, didn't you? A. For my own purposes, yes.

Q. And that holding company is the plaintiff here, isn't it? A. Yes.

Q. So at the time you asked Frankenberg to hold the key, thereby creating the usufruct, you were carrying out what you had originally told your father was your intention? Isn't that right? A. No, you can't say that, because at this time most of these securities were not yet in the corporation.

Q. Well, in so far as the securities were in the corporation, you were carrying out your announced intention? A. In the corporation in Overseas, where at the time the gold coins valued 6.4 million Swiss francs, the main value in the corporation.

Q. Will you answer the question? A. Would you please read it?

The Reporter (reading): "Question: Well, in so far as the securities were in the corporation, you were carrying out your announced intention?"

Mr. Burling: At this time I ask plaintiffs—well, first I ask that the document be marked for identification Defendant's Exhibit 47-A.

Mr. Gallagher: No objection.

(The documents referred to were marked Defendant's Exhibits 47 and 47-A for identification.)

By Mr. Burling:

Q. Did you answer the question after the reporter read it, Mr. von Opel? A. The part of the values there at this time in Overseas.

938 Q. But that isn't an answer, is it? In so far as the proceeds had by 1935 found their way into Overseas, then the asking of Frankenberg to hold the key for your father was a carrying out of what you told your father you would do, on October 5, 1931? A. It was a part of my original intentions, yes.

Q. Now, I show you Defendant's Exhibit 47-A and ask you if that is a cable sent by you. A. Yes.

Q. And it is sent by you from New York to Adler and Company, or to the cable name for Adler and Company in Zurich, isn't it? A. It is addressed to Adler and Company, yes.

Q. And it begins, does it not—

"Overseas was instrumentality for executing gift agreement"—

Is that statement correct? A. Yes—was the instrument used for purposes of gift agreement, I would say.

Q. And it goes on to say, does it not?

"Therefore my assignment 1932 was not in trust because made without right to reclaim, since any demand of return would have frustrated concentration and safeguarding of his sister's rights demanded by my father."

939 A. There is a point in between, as far as I understand this cable.

Q. Well, will you read it? Will you translate it and read it as you understand it? A. I think there is a point between the word, "Rueckforderungarecht" and "durch."

Q. Well, will you read it, as you understand it, in English. A. It says, "My assignment 1932 is no trust, because there is no right to reclaim."

Q. Go ahead, please. A. "Through reclaiming said concentration and security intended by my father and for my sister, would have been made impossible."

Q. Does it refer to security intended by your father, or security of rights demanded by your father? A. Rights demanded by my father, those stipulations of the gift contract.

Q. That refers to rights which your sister got and other rights which your father demanded, doesn't it? A. Yes, I at the time even thought my sister had some rights to it. And you expressed the same opinion. I now found out that the accounting, that it was only an accounting provision. And I close saying—

940 "If you share this legal opinion, please tell me so"—no—"please inform the American lawyers."

It speaks about my opinion on these legal matters, which I wanted to have checked by the Swiss lawyers, to see if they were right or not.

941.

By Mr. Burling:

Q. Will you look once more at Defendant's 46-A, and I invite your attention to a pencil stroke at the place of signature. Can you identify that? Is that not Dr. Frankenberg's mode of indicating his initial? A. I never have seen that before. That is just a scratch. It might be even in here—

Q. You cannot identify it? A. No.

Mr. Burling: Excuse me, Your Honor, I seem to have the wrong document. (Pause) I have the right document. I just have two different translations.

Mr. Ingoldsby: Is that 48?

Mr. Burling: This is 46-A I am inquiring about.

By Mr. Burling:

Q. Will you look in the middle of this cable, Defendant's 46-A, and see whether it is correctly translated: "—this method was necessary and intended for that reason alone because all assets acquired for sold Opel stock had to be consolidated and safeguarded in the Overseas as executive organ of gift contract between Geheimrat Opel and Fritz Opel." A. Yes, that's what it says.

Q. Did you ever have any talk with Dr. Frankenberg as to whether Overseas was the executive organ of 942 the gift contract? A. I explained to him in general what the gift contract stipulated, and I further explained to him the situation we were confronted with in Germany, and said I wanted to be helpful to my father.

Q. When was it that you learned for the first time that your father did not wish to make Frankenberg his agent? A. That was in the summer or fall of 1935.

Q. And what did your father say to you at this time, and what did you say to him? A. I reported to my father what I had done, and I gave him the reasons why, and I

asked him whether he consented to my actions. He told me no. He said he wanted to do the opposite, that he wanted to get rid of Niessbräuch once and for all; because otherwise it would cause new trouble every year not only with the foreign exchange control, but also in regard to income taxes and property tax declarations.

Q. And he said to you that he would not consent to have Frankenberg hold the key to the box as his agent, is that right? A. Yes.

Q. You are perfectly clear about that? A. Perfectly clear, yes.

Q. What month did you say this took place in? A. I couldn't give you the exact date.

Q. As close as you can get to it. A. It was summer or fall of 1935, shortly before the first letters were written to the German Government renouncing these Niessbrauch.

Q. And at that time you understood, did you not, that Frankenberg was not holding the key as agent for your father? A. After my father informed me that he didn't want Dr. Frankenberg to act as his agent, I, of course, in turn informed Dr. Frankenberg.

Q. Promptly? A. I don't know the exact date.

Q. Did you inform him promptly? A. I informed him.

Q. Promptly? A. Promptly, I couldn't tell you any specific date. I mean, this is 12 or 15 years ago.

Q. And did you also inform John W. Davis that your affidavit was in error, and that Frankenberg was not holding the key, and that your father did not have the usufructuary interest? A. At this time I think—

Q. Did you or did you not? A. I do not think so, because it was not necessary.

Q. You had filed an affidavit in June in which you swore in a court that you had mere legal title, that the usufruct was valid, that Frankenberg was holding the key to the box in which the Uebersee shares were held, as your father's agent? A. Yes.

Q. Now you say after the conversation with your father you learned that your father was—that Frankenberg was not your father's agent, there had been no valid delivery of possession, that there was no in rem usufruct? A. Correct, yes.

Q. Did you do anything at all to correct the affidavit that you had filed in the United States District Court for the Southern District of New York? A. That—

Q. Did you do anything? A. No, I did not do anything at this time because at this time the court was through—it was through the courts.

Q. You know very well that is not so, do you not? A. I think so, yes.

Q. Are you not aware that John W. Davis argued in the United States Circuit Court of Appeals for the Second Circuit in 1936, telling the Court the facts to be as stated in your affidavit? A. As I remember, this action undertaken by John W. Davis had nothing to do with any Niessbrauch, it was a mere level argument on Constitutional rights or safeguards.

Mr. Burling: Your Honor, I am taken by surprise,
945 but I wonder if I could send to obtain 83 Federal
2nd, which will establish this point.

The Court: You can do that at any time.

Mr. Burling: Thank you, Your Honor.

By Mr. Burling:

Q. You knew very well, did you not, that the argument was being made in the gold case; in fact, the principal argument was that the beneficial interest in the gold was in your father, who was not in this country, and that since he was not here, and was not doing business here, he had a right to export the gold. A. Yes, I saw that it was a constitutional question.

Q. Did you or did you not understand that to be the